(1)

Supreme Court, U.S.
FILED

IN THE UNITED STATES SUPREME COURT

Brian Yinger,

971658 APR 6 - 1998

Petitioner-Plaintiff,

OFFICE OF THE CLERK

vs.

City of Dearborn, City of Dearborn Police and Fire Revised Retirement System, Kevin O'Reilly, David Huck, Richard Harder, Stephen Miller, Suzanne Sareini, Jeffery Pepper, Michael A. Guido, Ronald F. Deziel, Police Officers Association of Dearborn, Police Officers Association of Michigan, in their individual and official capacities, jointly and severally.

Respondents-Defendants.

_____/.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

56 pp

QUESTIONS PRESENTED

I. Whether, under the Full Faith and Credit statute and authority from the Court issued subsequent to the Court of Appeals' denial of rehearing herein, a prior Michigan court judgment should have any res judicata effect where the state court held it had no jurisdiction to hear the claims filed therein, where this cause of action involves facts which occurred after the dismissal of the Michigan case and where the Michigan courts would not give any preclusive effect to the judgment?

II. Whether a post-termination Due Process claim, in the employment context, arises upon notice of termination or when the post-termination is ultimately denied?

III. Whether there are any potential res judicata effects if a judgment is rendered prior to the accrual of post-termination Due Process claim?

TABLE OF CONTENTS

Questions Presented i

Table of Authorities iv

Opinions viii

Jurisdiction ix

Involved Provisions x

Statement of the Case 1

Argument 5

Reasons for Allowing the Writ 16

CASES

Armstrong v. Manzo, 380 U.S. 545 (1965) 14

Baker v. General Motors, 522 U.S. ___, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998) 6, 7

Chardon v. Fernandez, 454 U.S. 6 (1981) 11

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 13

DeVito v. Chicago Park District, 972 F.2d 851 (7th Cir. 1992) 14

Delaware State College v. Ricks, 449 U.S. 250 (1980) . 11

Department of Social Services v. Hamlet, 225 Mich. App. 505 (1997) 9

Durfee v. Duke, 375 U.S. 106 (1963) . 7, 8

Fraternal Order of Police v. City of Detroit, 207 Mich. App. 606 (1994) 9

Frock v. United States Railroad Retirement Board, 685 F.2d 1041 (7th Cir. 1982) . . 15

Givens v. United States Railroad Retirement Board, 720 F.2d 196 (D.C.Cir. 1983) . . . 15

In re Pardee, 190 Mich. App. 243 (1991) . 10

In Re Koernke Estate, 169 Mich. App. 397 (1988) . 10

Isaacs v. Bowen, 865 F.2d 468 (2nd Cir. 1989) 15

Kelly v. Railroad Retirement Board, 625 F.2d 486 (3rd Cir. 1980) 15

Lichon v. American Universal Ins. Co., 435 Mich. 408 (1990) . . 9

Mathews v. Eldridge, 424 U.S. 319 (1976) . . 14

McKinnney v. Pate, 20 F.3d 1550 (11th Cir. 1994) 14

Migra v. Warren City School Dist. Bd. of Ed., 465 U.S. 75 (1984) . 7

OPINIONS

None of the opinions herein were reported.

JURISDICTION

The Petitioner seeks to invoke the jurisdiction of the Court by seeking a Writ of Certiorari from the judgment of the Sixth Circuit of the United States Court of Appeals entered on November 18, 1997. A Petition for Rehearing was denied on January 6, 1998. No order granting an extension of time for filing certiorari has been entered. Jurisdiction is conferred upon the Court to review the judgment and order in question by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

INVOLVED PROVISIONS

1. 28 U.S.C. §1738:

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and it Territories and Possessions as they have by law or usage in the courts of such State Territory or Possession from which they are taken."

42 U.S.C. §1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution an laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for

redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

U.S. Constitution, Amendment XIV, Sec. 1: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Brian Yinger brought this action primarily on the basis of events which occurred after previous litigation was dismissed. Mr. Yinger had been a veteran of the police force of the City of Dearborn, Michigan, for 17 years prior to placement on "involuntary leave" by Chief Deziel in 1993. In all previous litigation, the defendants have successfully argued that Mr. Yinger had never been discharged.

However, during the proceedings herein, the defendants argued that Mr. Yinger had been discharged prior to a previous action. The dismissal of the state court action in Yinger v. Bromley, Trainor, Powell, Deziel and City of Dearborn, #94-409844 (*Yinger II*), upon which the Court of Appeals and district court relied on for res judicata effect, happened in February of 1995. *Yinger II* was brought to enforce an agreement made

during and independent of a federal court action between the parties (*Yinger I*)[1]. The defendants in *Yinger II* claimed that the state court had no jurisdiction to hear the cause because exclusive

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1. In *Yinger I*, Mr. Yinger filed a suit in federal court based on retaliation for the defendant's perception that he had alerted the media to the coverup and dismissal of a police officer's drinking and driving offense, activity protected by the First Amendment. During those proceedings, counsel for the city defendants termed Mr. Yinger's employment status as **"medical leave"** and **"involuntary leave."** (Docket #6, Defendants' Exhibit D, Transcripts from Prior Hearing in Federal Court, pp. 6-7, 9) In the Sixth Circuit Court of Appeals in a prior appeal, counsel argued in subheading D on page 38 of appellees' brief (signed 7-5-94) in Yinger v. City of Dearborn and Ronald Deziel, COA #94-1225 (*Yinger I*), "Defendants would have placed Plaintiff on **medical leave** in the absence of the alleged constitutionally protected behavior" and stated, on page 8, "**[t]o date [7-5-94], his medical leave** has been continued by the Civil Service Commission at the request of the Chief."

jurisdiction was vested in the Michigan Employment Relations Commission. This argument was based on the proposition that the agreement fell within the confines of the grievance machinery of the collective bargaining agreement. The state court dismissed *Yinger II* on 2-23-95 for lack of jurisdiction.

Within 2-3 weeks after the dismissal of *Yinger II*, in early March of 1995, the City of Dearborn and some of the individual defendants gave notice that they planned to force Mr. Yinger into non-duty disability retirement. The pension board hearing which resulted in the constructive discharge of Mr. Yinger occurred in late March of 1995. Based

Based upon this constructive discharge of Mr. Yinger, he brought the suit herein claiming due process violations concerning post-termination due process/42 U.S.C. §1983 violations and improper use of medical records and

Americans with Disabilities Act and the Michigan Constitution.

It would have been impossible to include these events leading to discharge in the state court action. On November 29, 1994, in the Decision and Recommended Order of the Administrative Law Judge (ALJ) of the Michigan Employment Relations Commission in P.O.A.M. v. Brian Yinger, #CU94 A-5 (*Yinger MERC*), the ALJ found that Mr. Yinger had not been discharged at that point in time and that no grievable offense had occurred. Mr. Yinger complained in that action that the union had failed to grieve his "indefinite medical leave" status. On January 1, 1995, the Michigan Employment Relations Commissions affirmed that decision. As of February, 23, 1995, the city defendant's counsel argued in the state court proceeding (*Yinger II*) that there had been no breach of contract by adopting and referencing the opinion in

Yinger MERC. (Docket #6, Defendants' Exhibit F, Transcripts from Prior Hearing in state court, p. 17).

The defendants have argued, in the lower courts herein, that res judicata prevented Mr. Yinger from proceeding with this suit. The Sixth Circuit upheld the dismissal based upon this theory.

I. BAKER V. GENERAL MOTORS, A DECISION BY THIS COURT ISSUED SUBSEQUENT TO THE DECISION BY THE COURT OF APPEALS, UNDERMINES THE RATIONALE OF THE SIXTH CIRCUIT'S DECISION.

A. Baker reaffirmed the principle that the prior judgment must have been by a Court with jurisdiction to render the judgment.

The Michigan Circuit Court based its dismissal in the *Yinger II* on a lack of jurisdiction as follows.

> THE COURT: (Interposing) [MERC, the Michigan Employment Relations Commission] [w]ho has, by the way, exclusive jurisdiction over disputes between employees and their employers.

(Docket #6, Defendants' Exhibit F, Yinger v. Bromley, Hearing on 2-23-95, p. 19)

> I am not taking a position on whether or not the due process claim of Corporal Yinger is, is enforceable as a matter of law or states a cause of action as a matter of law.
>
> Because I firmly believe that this Court has no jurisdiction to inject itself into this matter. And it must proceed to its resolution, whether in appeal stages or not . I'll take Mr. Davis word for that. It must proceed to resolution at MERC.

(Docket #6, Defendants' Exhibit F, Yinger v. Bromley, Hearing on 2-23-95, p. 23).

"A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." Baker v. General Motors, 522 U.S. ___, 118 S.Ct. 657, 663-64, 139 L.Ed.2d 580, 592 (1998). This principle of the Full Faith and Credit Clause, as embodied by 28 U.S.C. §1738, is applicable

to federal courts with respect to prior state court judgments. Baker, 118 S.Ct. at 663, 139 L.Ed.2d at 591; Migra v. Warren City School Dist. Bd. of Ed., 465 U.S. 75, 80-81 (1984).

> To be sure, the structure of our Nation as a union of States, each possessing equal sovereign powers, dictates some basic limitations on the full-faith-and-credit principles enumerated above. Chief among these limitations is the caveat, consistently recognized by this Court, that "a judgment of a court in one State is conclusive upon the merits in a court in another State ***only*** if the court in the first State had power to pass on the merits – had jurisdiction, that is, to render the judgment." Durfee v. Duke, 375 U.S. 106, 110 (1963).
>
> Consequently, before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given. See Nevada v. Hall, 440 U.S. 410, 421 (1979).

Underwriters Assur. Co. v. N.C. GuarantyAssn., 455 U.S. 691, 704-05

(1982) (emphasis added).

"From [previous decisions of the Court] there emerges the general rule that a judgment is entitled to full faith and credit – even as to questions of jurisdiction – when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." Durfee v. Duke, 375 U.S. 106, 111 (1963). "Any doubt about this proposition was definitively laid to rest in Durfee v. Duke." Underwriters Assur. Co., 455 U.S. at 706.

B. The concurring opinion by Justice Kennedy in Baker indicates that Michigan law surrounding res judicata was misapplied by the lower court herein.

Michigan law requires mutuality ofparties in a prior action in order for there to be a binding effect therefrom.

Baker, 118 S.Ct. at 671 (Kennedy, with whom O'Connor and Thomas joined, concurring in judgment) quoting Nummer v. Treasury Dept., 448 Mich. 534 (1988) and Lichon v. American Universal Ins. Co., 435 Mich. 408 (1990). A number of the parties herein were not parties to *Yinger II*.

It should also be noted that Michigan would not give the judgment preclusive effect pursuant to court rule. M.C.R. 2.504(B)(3). Moreover, the Michigan courts have held that this is the type of situation in which a prior proceeding should have no res judicata effects. New facts surrounding the pension board hearing created the cause of action herein and occurred about one month after the dismissal of a *Yinger II*. Department of Social Services v. Hamlet, 225 Mich. App. 505, 519 (1997) citing Fraternal Order of Police v. City ofDetroit, 207 Mich. App. 606 (1994), In

re Pardee, 190 Mich. App. 243, 248 (1991) and In Re Koernke Estate, 169 Mich. App. 397, 399-400 (1988).

The "new facts" of an inadequate post-termination hearing were the primary thrust of the complaint herein. Also, violations of the Americans with Disabilities Act and of Michigan law which are independent of any question about discharge are alleged. These violations happened after the dismissal of the state case.

II. EVEN IF MR. YINGER HAD BEEN GIVEN NOTICE OF DISCHARGE PRIOR TO THE STATE COURT PROCEEDING, THE CLAIM FOR VIOLATION OF POST-DEPRIVATION DUE PROCESS DID NOT ACCRUE UNTIL AFTER THE STATE COURT DISMISSAL.

Even with the finding that Mr. Yinger was discharged sometime prior to the dismissal of the state court proceeding in February of 1995, it was still necessary to determine whetherthere had been a violation of Mr. Yinger's

right to a constitutionally adequate post-termination hearing at that point.

The state court dismissed the action on 2-23-95. Thus, if Mr. Yinger was discharged from his employment prior to that hearing, one must consider whether the constitutional violation had previously accrued.

A procedural due process violation, based on inadequacies in or lack of post-termination proceedings, is not actionable the moment one is terminated. The very nature of post-termination procedural due process violations distinguishes the accrual date in employment matters from other types of employment related causes of action. Compare, Chardon v. Fernandez, 454 U.S. 6, 8 (1981) (claim for discharge in retaliation for the exercise of First Amendment rights accrues on the date theemployee is told of discharge even if actual disengagement from employment

occurs much later) and Delaware State College v. Ricks, 449 U.S. 250 (1980) (ditto with regard to an action involving a Title VII discrimination claim and a claim under 42 USC. §1981).

In order for a post-termination Due Process claim to accrue, there must be either: (a) an unconstitutional delay in providing the post-termination hearing; or (b) a Due Process violation during any post-termination hearing. There is no cause of action based on a post-termination due process violation until one of these events occurs. As stated in Zinermon v. Burch, 494 U.S. 113, 126 (1990), in analyzing when a there is a post-deprivation procedural due process violation:

> The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the Statefails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to

ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

(emphasis added); see also, McKinnney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc) (no cause of action "unless and until the state refuses to provide due process" via refusal to provide a post-termination hearing).

As set forth in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 547 (1985), a nine-month delay is not too long absent some specific indication of unreasonableness other than the mere fact of delay.

> The Due Process Clause requires provision of a hearing "at a meaningful time." E. g., Armstrong v. Manzo, 380 U.S. 545, 552 (1965). At some point, a delay in the post-termination hearing would become a constitutional violation. See Barry v. Barchi, 443 U.S., at66. In the present case, however, the complaint merely recites the course of

proceedings and concludes that the denial of a "speedy resolution" violated due process. App. 10. This reveals nothing about the delay except that it stemmed in part from the thoroughness of the procedures. **A 9-month adjudication is not, of course, unconstitutionally lengthy per se.** Yet Loudermill offers no indication that his wait was unreasonably prolonged other than the fact that it took nine months. The chronology of the proceedings set out in the complaint, coupled with the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation.

(emphasis added).

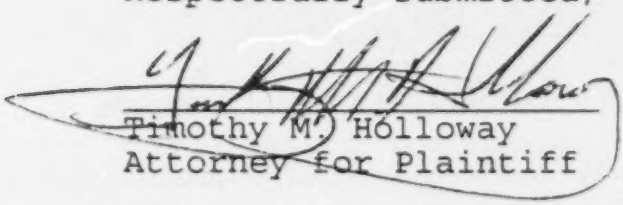
Although "[a]t some point, a delay in the post-termination hearing would become unconstitutional", id, there are no constitutional violations when there are delays much greater than involved herein when the interest in question involves one's livelihood. Mathews v. Eldridge, 424 U.S. 319, 341-42 (1976) (10-11 month average delay in post-termination hearing on social security benefits is constitutional); DeVito v. Chicago Park District, 972 F.2d 851 (7thCir. 1992) (one year delay in

providing post-termination hearing for discharged public employee is constitutional); Isaacs v. Bowen, 865 F.2d 468 (2nd Cir. 1989) (19 months for review of Medicare benefits is constitutional); Ritter v. Cohen, 797 F.2d 119 (3rd Cir. 1986) (post-termination hearing of 20 months is constitutional when physician is terminated from Medicaid program); Givens v. United States Railroad Retirement Board, 720 F.2d 196, 201 (D.C.Cir. 1983) (19 month delay after denial of railroad benefits is constitutional); Frock v. United States Railroad Retirement Board, 685 F.2d 1041, 1047 (7th Cir. 1982) (two year delay). On the other hand a delay of almost four (4) years has been held to be an unconstitutional delay. Kelly v. Railroad Retirement Board, 625 F.2d 486 (3rd Cir. 1980).

REASONS FOR ALLOWING THE WRIT

Wherefore, the plaintiff prays this Court allow the Writ of Certiorari for the reasons that the second question presents, in the employment context, an important question of federal law which has not been, but should be settled by this Court, and the first question involves a decision of a U.S. Court of Appeals that conflicts with applicable decisions of this Court.

Respectfully submitted,



Timothy M. Holloway
Attorney for Plaintiff

Dated: 4-5-98

APPENDIX

1. Bench opinion of dismissal 1
2. Bench opinion on rehearing 5
3. Order of Dismissal 7
4. Order Denying Rehearing 9
5. Court of Appeals Opinion 11
6. COA denial of rehearing 33

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Brian Yinger,

CIVIL ACTION

Appellant-Plaintiff,

No. 95-CV-75525-DT

vs.

City of Dearborn, City of Dearborn Police and Fire Revised Retirement System, Kevin O'Reilly, David Huck, Richard Harder, Stephen Miller, Suzanne Sareini, Jeffery Pepper, Michael A. Guido, Ronald F. Deziel, Police Officers Association of Dearborn, Police Officers Association of Michigan, in their individual and official capacities, jointly and severally.

_____/.

DEFENDANT'S MOTION TO DISMISS
BEFORE THE HONORABLE ANNA DIGGS TAYLOR
United States District Judge
739 US Courthouse & Federal Building
231 Lafayette Boulevard West
Detroit, Michigan
Monday, March 25, 1996

* * *

[ruling from the bench, 24-26]

THE COURT: Yes. The court will assume that nonduty related pension certainly is a lesser pension than duty, that is clear from the record here.

Well, for the reasons that have been briefed and argued on behalf of the City here, the court is going to grant the motion on the A.D.A. count.

The plaintiff's claim is clearly untimely and it's also barred by res judicata.

The discriminatory act that he claims on which is the decision not to return him to work and the decision that which was the decision that prompted him to ask for a pension occurred at the latest by the end of March 1994 when he filed his state lawsuit for reinstatement.

So clearly this count today is untimely. And the court rejects his claim that he is not subject to any statute of limitations because he a public employee.

There is not law to which the court is directed or is ever heard that holds anything supporting that argument.

The claim on the duty to accommodate is barredas there was never a request as the law requires for accommodation.

The discrimination claim under the Michigan Handicap Law must be dismissed because the res judicata is applicable here. The claim had to be joined.

There was compulsory joinder of this claim with the others that he has previously had adjudicated here and the failure to bring that claim during the state proceedings when he knew he would not be returned to work makes the claim barred here.

The due process claim is similarly barred by res judicata as is the contract for reinstatement. The court found that sole jurisdiction on this breach of contract question rested on the MERC jurisdiction over whether there was an unfair labor practice or not. There wasn't.

MERC found there wasn't a breach of

contract and the duty of fairrepresentation claim also is barred by the statute of limitation.

The due process claim concerning the hearing is dismissed on the undisputed record, really. Plaintiff was given all process that the law requires.

The equal protection claim is dismissed because there is no suggestion that he's a member of any protected group and the rational basis for the defendant's actions are clear on the face here.

And the conspiracy claim which is derivative of all of the other substantive claims is also dismissed as those claims had to be.

So for the reasons briefed and argued by the defense, the motion is granted.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Brian Yinger,

CIVIL ACTION

Appellant-Plaintiff,

No. 95-CV-75525-DT

vs.

City of Dearborn, City of Dearborn Police and Fire Revised Retirement System, Kevin O'Reilly, David Huck, Richard Harder, Stephen Miller, Suzanne Sareini, Jeffery Pepper, Michael A. Guido, Ronald F. Deziel, Police Officers Association of Dearborn, Police Officers Association of Michigan, in their individual and official capacities, jointly and severally.

_____/.

PLAINTIFF'S MOTION FOR REHEARING

BEFORE THE HONORABLE ANNA DIGGS TAYLOR
United States District Judge
739 US Courthouse & Federal Building
231 Lafayette Boulevard West
Detroit, Michigan
Monday, May 13, 1996

* * *

[ruling from the bench, p. 12]

THE COURT: No. That's all.

And it appears i must deny the motion for reconsideration for all the

reasons that the defense has briefed and argued here.

Under the local rule, no palpable defect by which the court was mislead has been presented. The arguments are essentially those on which the court ruled before.

And for all the reasons of the previous ruling and the reasons briefed here by the defense, I have to deny the motion.

So, please present an order, would you?

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Brian Yinger,

Case No. 95-CV-75525

Plaintiff,

Hon. Anna Diggs Taylor

vs.

City of Dearborn, City of Dearborn Police and Fire Revised Retirement System, Kevin O'Reilly, David Huck, Richard Harder, Stephen Miller, Suzanne Sareini, Jeffery Pepper, Michael A. Guido, Ronald F. Deziel, Police Officers Association of Dearborn, Police Officers Association of Michigan, in their individual and official capacities, jointly and severally.

Defendants.

_____/.

ORDER OF DISMISSAL

At a session of Court
held in the U.S.
District Courthouse
Detroit, Michigan on Mar 25 1996

PRESENT: HON. ANNA DIGGS TAYLOR
U.S. DISTRICT COURT JUDGE

This matter having come before the Court on Defendant's Motion to Dismiss, the parties having filed briefs, the

Court having reviewed the briefs and heard oral argument, and being fully advised in the premises;

IT IS HEARBY ORDERED that the Defendants' Motion to Dismiss is GRANTED for the reasons stated on the record and that Plaintiff's Complaint against City of Dearborn, City of Dearborn Police & Fire Revised Retirement System, Kevin O'Reilly, David Huck, Richard Harder, Stephen Miller, Suzanne Sareini, Jeffrey Pepper, Michael A. Guido and Ronald Deziel is dismissed with prejudice.

[signature]
U.S. DISTRICT JUDGE
[court stamp and certification]

Dated: March 21, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Brian Yinger,

Case No. 95-CV-75525

Plaintiff,

Hon. Anna Diggs Taylor

vs.

City of Dearborn, City of Dearborn Police and Fire Revised Retirement System, Kevin O'Reilly, David Huck, Richard Harder, Stephen Miller, Suzanne Sareini, Jeffery Pepper, Michael A. Guido, Ronald F. Deziel, Police Officers Association of Dearborn, Police Officers Association of Michigan, in their individual and official capacities, jointly and severally.

Defendants.

_____/.

ORDER DENYING PLAINTIFF'S MOTION FOR REHEARING

At a session of Court held in the U.S. District Courthouse Detroit, Michigan on May 13 1996

PRESENT: HON. ANNA DIGGS TAYLOR
U.S. DISTRICT COURT JUDGE

This matter having come before the Court on Plaintiff's Motion for Rehearing, the parties having filed briefs, the Court having reviewed the briefs and heard oral argument, and being

fully advised in the premises;

IT IS HEARBY ORDERED that the Plaintiff's Motion for Rehearing is DENIED for the reasons stated on the record and that the Order Dismissing with Prejudice Plaintiff's Complaint against the City of Dearborn, City of Dearborn Police & Fire Revised Retirement System, Kevin O'Reilly, David Huck, Richard Harder, Stephen Miller, Suzanne Sareini, Jeffrey Pepper, Michael A. Guildo and Ronald Deziel is affirmed.

[signature]
U.S. DISTRICT JUDGE
[court stamp and certification]

Dated: May 13, 1996

No. 96-2384

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT [STAMP 1-18-97]

BRIAN YINGER,

Plaintiff-Appellant,

vs. On Appeal from the United States District Court for the Eastern District of Michigan

CITY OF DEARBORN, CITY OF DEARBORN POLICE AND FIRE REVISED RETIREMENT SYSTEM, KEVIN O'RIELLY, DAVID HUCK, RICHARD HARDER, STEPHEN MILLER, SUZANNE SARIENI, JEFFREY PEPPER, MICHAEL A. GUIDO, RONALD F. DEZIEL, POLICE OFFICERS ASS'N OF DEARBORN, POLICE OFFICERS ASS'N OF MICHIGAN, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, JOINTLY AND SEVERALLY,

Defendants-Appellees.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. In the Sixth Circuit, if cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced. Please see Rule 24 before citing in a proceeding in a court.

BEFORE: LIVELY, KENNEDY and NELSON, Circuit Judges.

PER CURIAM. Plaintiff Brian Yinger, a former police officer for the City of Dearborn, appeals the District Court's dismissal of his complaint. Plaintiff complained that defendants: a) compelled him

to undergo unnecessary psychological testing, in violation of the ADA and the MHCRA; b) discharged him in violation of the ADA, the MHCRA and the Due Process and Equal Protection Clauses; c) placed him on a non-duty disability pension in violation of the ADA and the MHCRA; and 4) failed to accommodate his perceived disability in violation of the ADA, the MHCRA, the City of Dearborn Civil Service Rules, and the Due Process and Equal Protection Clauses. Plaintiff further alleges that defendants breached plaintiff s employment contract and conspired to violate plaintiffs constitutional rights. On appeal, the issues are whether the District Court erred in granting defendants' motion to dismiss, on the ground that the applicable statutes of limitations and res Judicata barred plaintiff s claims, or in awarding attorneys' fees to defendants. For the reasons that follow, we **AFFIRM.**

I. FACTS

On May 21, 1993, defendant Deziel, the Chief of the Dearborn Police Department,

ordered plaintiff to submit to psychological evaluations. Plaintiff initially participated in two evaluations. Dr. Mary Ann Hamlin, a psychologist to whom the City of Dearborn referred plaintiff, conducted the first evaluation in May and June of 199'). Dr. Hamlin found that plaintiff suffered from a paranoid personality disorder and was psychologically unfit "to perform the duties of a police officer in the Dearborn Police Department. After noting that paranoid personality disorder "tends to be a relatively stable and enduring, way of operating in the world" and that "there is no guarantee that [plaintiff] will not become physically aggressive in the future," she recommended that the department confiscate his weapons and remove him from his position as a police officer. The union, on behalf of plaintiff, chose Dr. Christine Panyard to conduct a second evaluation in June, 1993.

Dr. Panyard confirmed Dr. Hamlin's findings that plaintiff had a paranoid personality disorder and "was incapable of functioning as a police officer at this time." Based on these two reports, the Dearborn Civil Service Commission, at defendant Deziel's request, placed plaintiff on indefinite medical leave without pay on July 8, 1993. Defendant Deziel notified plaintiff of the Commission's decision the next day by memorandum.

Plaintiff first filed suit against defendant Deziel and the City of Dearborn on July 22, 199') in federal district court, alleging, that the compulsory psychological evaluations and his forced medical leave violated his First Amendment rights, his right to Due Process and the Michigan Constitution, and that these actions constituted a wrongful discharge. On December 26, 1994, the District Court dismissed the complaint. The Sixth Circuit

Court of Appeals affirmed this ruling, on September 19, 1995.

While this earlier action was still on appeal, the parties agreed that if a third, independent psychologist, Dr. Erard, found plaintiff fit for duty as a police officer, plaintiff could return to work. Subsequent to evaluating plaintiff, Dr. Erard issued a report dated February 22, 1994, stating that plaintiff was psychologically fit to serve as a police officer.

In reaching- his conclusions, Dr. Erard relied on plaintiff's statements concerning his personal history, including his military background. For example, plaintiff told Dr. Erard that he had been a Navy SEAL and had received a purple heart and two silver stars. Upon receipt of the doctor's evaluation, defendants, surprised that they had no knowledge of plaintiff's extraordinary military activities, requested confirmation. When plaintiff failed to produce any evidence of his alleged military honors, defendants conferred with relevant military personnel who confirmed that plaintiff had neither served as

a Navy SEAL, nor received the medals he claimed. Plaintiff nonetheless continues to maintain that he was truthful about his military accomplishments.

Defendants also were concerned that the evaluation had been tainted by the fact that plaintiff had provided Dr. Erard with "reference letters" which defendants contend were prepared specifically for the evaluation in order positively to influence the psychologist's opinion of plaintiff. Based on plaintiff s provision of these letters and false personal history information to Dr. Erard, the City concluded that Dr. Erard's evaluation was unreliable. Consequently, the City declined to return plaintiff to the force.

Plaintiff filed a second lawsuit in Wayne County Circuit Court on March 29, 1994. His complaint alleged that the City, defendant Deziel and the Civil Service Commission violated his Due Process fights and breached a contract by failing to return him to work after Dr. Erard found him fit for duty. The court dismissed plaintiff s complaint on March

15, 1994. Plaintiff appealed only the dismissal of the breach of contract claim. The Michigan Court of Appeals affirmed the lower court's ruling, on the ground that plaintiff could not maintain his suit in the Circuit Court because he had neglected to exhaust his administrative remedies before filing, his complaint. Yinger v. Bromley, (unpublished) (citing, Mollett v. Taylor, 494 N.W.2d S')2 (Ohio Ct. App. 1992). Alternatively, the appellate court held that plaintiff could pursue the breach of contract claim against his employer only if he first proved that his union had breached its duty of fair representation to him. Id.

While the Wayne County Circuit Court case was pending, plaintiff filed an unfair labor practice charge against his union alleging that by failing to act on his behalf, the union had breached its duty of fair representation. An administrative law judge (ALJ) heard the case on June 23, 1994 and subsequently issued an opinion stating, that the union did not breach its fair representation duty. The Michigan Employment

Relations Commission (MERC) affirmed the ALJ's decision, and plaintiff did not appeal the MERC ruling.

On March 7, 1995, defendant Deziel requested that the Pension Board grant plaintiff a nonduty disability pension based on Dr. Hamlin and Dr. Panyard's findings that he was psychologically disabled from functioning as a police officer.

On March 17, 1995 plaintiff applied for a duty disability pension based on the psychologists' statements that they perceived plaintiff to be unfit for duty as a police officer. Plaintiff reiterated, however, that he was not, in fact, disabled. Alternatively, plaintiff requested a pension based on an old shoulder injury. The only medical evidence plaintiff submitted to support his claim of disability due to the shoulder injury, however, indicated a complete recovery.

The Pension Board met and considered plaintiffs case on March 30, 1995. Plaintiff attended the meeting, and his

attorney addressed the Board. The Board granted plaintiff a non-duty based pension based on the psychological evaluations, one of which specifically stated that plaintiff's paranoid personality disorder was not work-related.

Plaintiff also attended the Pension Board's next meeting, in June. Although his attorney was welcome to attend, he did not. The Board discussed with plaintiff the possibility of converting his non-duty disability pension into a duty disability pension based on plaintiffs shoulder injury. However, the Board informed plaintiff that it would need additional information substantiating his claim that this injury constituted a permanent disability. Plaintiff never produced the requested evidence.

On November 3, 1995, plaintiff filed this action in federal district court. The District Court heard arguments on and granted defendants' motion to dismiss. It

ruled that the ADA and the MHCRA claims were barred by res judicata and that the alleged discriminatory act was the decision not to return plaintiff to work. It found that the defendants made this decision, at the latest, in March of 1994, prior to plaintiff's filing,, of the second lawsuit in the Wayne County Circuit Court. Thus, it found that plaintiffs current claims also were untimely. In addition, the court held that compulsory joinder rules required plaintiff to bring all of the claims he alleged in this action in the second lawsuit.

With respect to the MHCRA claim, the District Court found that plaintiff failed to request accommodation, and that it was barred by res judicata. The principle of res judicata similarly barred the Due Process claim, although the Court noted that plaintiff had been afforded all of the process that was due anyway.

The Court then found that MERC had

decided the breach of contract claim. Alternatively, if the MERC decision did not encompass this allegation, the District Court found that the six-month statute of limitations in PERA for breach of the duty of fair representation claims against a union would bar the breach of contract claim.

The Court dismissed the equal protection claim because plaintiff did not establish membership in a protected group, and "the rational basis for the defendant's [sic] actions are clear on the face here." In addition, the Court dismissed the conspiracy claim as derivative of all of the other substantive claims which the Court was dismissing.

Plaintiff subsequently filed a motion for rehearing which the District Court heard and denied on May 13, 1994. Thereafter, plaintiff filed a motion for leave to amend which the Court denied on October 7, 1996. At the hearing

addressing the motion to amend, the Court ordered plaintiff to pay defendants' attorneys' fees as a sanction for bringing a frivolous and vexatious lawsuit.

Plaintiff now appeals the District Court's dismissal of his claims and the imposition of attorneys' fees sanctions against him.

II. DISCUSSION

Whether the District Court correctly dismissed plaintiffs claims is a question of law that we review de novo. Sistrunk v. City of Strongsville, 99 F.3rd 194, 197 (6th Cir. 1996).[1]

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1. It appears that the District Court converted defendants' motion to dismiss into a summary judgment motion to the extent that it relied on the pleading and judgments from the parties' previous lawsuits. As neither party has objected to this conversion, this Court need not determine its appropriateness.

A. Res Judicata Bars Plaintiff's Claims

Plaintiff contends that the District Court erred in dismissing his breach of contract claim, as well as his claims that he wasconstructively discharged in violation of the ADA, the MHCRA and the Due Process and Equal Protection Clauses on the ground that the doctrine of res judicata barred these claims. The Full Faith and Credit Act, 28 U.S.C. § 1738, requires that federal courts give the same preclusive effect to a state court judgment that a court of the state in which the judgment was rendered would accord the judgment. See Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1(1984); Heyliger v. State Univ. and Community College Sys. of Tenn., ___ F.3d ___ (6th Cir. 1997). In determining, whether, and to what extent, to give preclusive effect to a prior state court judgment, a federal court must look to the law of the rendering state. See Migra, 465 U.S. at 81; Hapgood v. City of Warren, ___ F.3d ___ (6th Cir. 1997). Consequently, in this case, we must rely on Michigan case law regarding res judicata.

At the heart of plaintiffs claims in each lawsuit lay the defendants' determination that plaintiff suffers from a condition that renders him unfit to serve as a policeofficer. Plaintiff has introduced no new evidence that he is now fit for duty. Instead, he has filed a new suit each time the defendants took an action that indicated that they had not changed their position about returning, plaintiff to work. In doing, so, plaintiff has failed to recognize that a discrimination claim accrues when the operative decision is made, not when he experiences the consequences of that decision. Chardon v. Fernandez, 454 U.S. 6, 8-9 (1981). In this case, the operative, allegedly discriminatory, decision underlying all of plaintiff's claims was the City's decision not to return plaintiff to work. The City made this decision upon receipt of the first two psychologists' reports or, at the latest, after receipt of Dr. Erard's report which was prior to March 29, 1994.[2] Since the

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2. 'Plaintiff argues that since,

operative decision occurred prior to the date on which plaintiff filed the second lawsuit in the Wayne County Circuit Court,

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for purposes of a motion to dismiss, the court must accept the allegations in the complaint as true, Neighborhood Action Coalition v- Canton, Ohio, 882 F.2d 1012, 1014 (6th Cir. 1989), the court erred in denying- his assertion that the constructive discharge -- the operative event -- occurred when plaintiff received the non-duty disability pension. However, the court must accept as true only plaintiff's factual assertions and may disregard the legal conclusions which plaintiff draws from these facts. Since whether and when the City constructively terminated plaintiff was a legal question, the court was free to disagree with plaintiff's assertion that he was not discharged until the City granted his pension.

the principle of res judicata clearly bars plaintiff s claims. Pursuant to this doctrine, a final and valid judgment on the merits precludes the parties, or their privies, from bringing a second suit on the same claim or any part of it. See Jones v. State Farm Auto. Ins. Co., 509 N.W.2d 829, 832-34 (Mich. Ct. App. 1993); Gose v. Monroe Auto Equip. Co., 294 N.W.2d 165 (Mich. 1980). Plaintiff litigated the city's decision not to return him to work 'in the second lawsuit; res judicata prevents him from taking,another "bite at the apple" under a different theory.

Plaintiff argues that the Wayne County Circuit Court proceedings are not res judicata because the state court held that plaintiff had not exhausted his administrative remedies and that MERC had exclusive jurisdiction over plaintiffs claims. It explicitly stated that its decision therefore was not on the merits.

However, plaintiff misses the mark in arguing that this decision renders the doctrine of res judicata inapplicable. The state court's decision is a decision on the merits with respect to the jurisdiction/exhaustion of remedies issue. Thus, in light of the Circuit Court's holding that MERC had exclusive jurisdiction to hear plaintiffs claims, res judicata precludes the federal court from hearing, the breach of contract claim.

Res judicata similarly barsplaintiff's remaining claims. The doctrine not only forbids the parties to relitigate claims that they actually litigated but also bars them from relitigation claims that they could have raised in an earlier action. See M.C.R. 2.203 (A)(1) (requiring a plaintiff to join every claim [he] has against that opposing party at the time of serving the pleading, if it arises out of the

transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties."); Jones, 509 N.W.2d at 834 ("Michigan has adopted the 'broad' application of res judicata, which bars claims arising out of the same transaction or that plaintiff could have brought but did not, as well as those questions that were actually litigated."). Thus, res judicata extinguishes "all rights of the plaintiff to remedies against the defendant withrespect to all or any part of the transaction, or series of connected transactions, out of which the action arose. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). The test for determining whether two claims stem from the same transaction and, for purposes of res judicata, are identical is whether "the same facts or evidence are essential to the maintenance of the two actions." Jones, 509 N.W.2d at

834. Since the facts and evidence essential to the maintenance of plaintiff s Wayne County Circuit Court action and the present action are identical, and the Pension Board's decision to grant plaintiff a pension did not constitute a new act of discrimination,[3] plaintiff may not try the disability discrimination and related claims in this Court.[4]

B. Attorneys Fees Award Appropriate

Plaintiff also contends that the District Court erred in awarding attorneys' fees to the defendants. We disagree.

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3. "An employer's refusal to undo a discriminatory decision is not a fresh act of discrimination." Lever v. Northwestern Univ., 979 F.2d 552, 556 (7th Cir. 1992), cert. denied, 508 U.S. 951 (1993).

4. 'Having, decided that the doctrine of res judicata bars plaintiff s claims, this Court need not address whether plaintiff filed his claims within the applicable statutes of limitations.

Courts may award attorneys' fees to a defendant only where a plaintiffs claims are unreasonable, frivolous, groundless or vexatious. Christiansburg v EEOC, 434 U.S.412, 421 (1978). This was such a case. "There must be an end of litigation, and out of sheer self-defense and considerations of broad public policy our courts cannot gladly permit repeated litigation of the same old question. . . ." Knowlton v. City of Port Huron, 94 N.W.2d 824, 828 (Mich. 1959). In this case plaintiff filed identical allegations in three lawsuits - such squandering of the courts' already too scarce time and resources cannot be tolerated.[5] The attorneys' fee award was justified.

The number of lawsuits, the length and frequency of motions for rehearing, and the number of appeals, all on the same subject, exhibit bad faith by the plaintiff. In such a

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5. 'The concerns underlying, the res judicata doctrine are economy of resources and finality of litigation. Gose, 294 N.W.2d at 167.

case, we will not consider plaintiffs ability to pay[6] since doing, so would not deter thefiling, of frivolous and vexatious suits. See Alizadeh v. Safeway Stores, 910 F.2d 234, 238 (5th Cir. 1990). Any other holding would enable plaintiffs to make themselves judgment proof and then pursue litigation endlessly and with impunity.

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6. The Supreme Court has never intimated that a party's ability to pay is a proper factor for courts toconsider in deciding whether to award attorneys' fees against that party. Alizadeh, 9 1 0 F. 2d at 2') 8. "The Court has suggested that attorneys' fees awards are not always purely compensatory in nature." Id. (citing Blanchard v. Bergeron, 489 U.S. 87 (1989) (section 1988 award neither necessarily limited to nor need be as **large** as amount provided in party's continent fee arrangement); Blum v. Stenson, 465 U.S. 886 (1984) (award to be calculated according to prevailing market rates rather than according to the cost of providing legal services).

III. CONCLUSION

For all of the foregoing, reasons, we **AFFIRM** the District Court's dismissal of plaintiff's case and the award of attorneys' fees to defendants. In addition, this Court enlarges theattorneys' fee award to include the costs defendants incurred in responding to this appeal.

96-2384

UNITED STATES COURT OF APPEALS [stamp 1-6-98]

BRIAN YINGER,

Plaintiff-Appellant,

ORDER

V.

CITY OF DEARBORN, ET AL.,

Defendants-Appellees.)

BEFORE: LIVELY, KENNEDY, and NELSON, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

[signature]

Leonard Green, Clerk